IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5856 OF 2004

Bhiwandi Nizampur City Municipal Corporation)
Bhiwandi, through its Commissioner, having its)
office at Old S.T. Stand, Bhiwandi, Dist. Thane.)..Petitioner

Versus

1. Hon'ble Chief Minister of the State of)
   Maharashtra, Mantralaya, Mumbai-32.)

2. The Secretary, Urban Development Department)
   Mantralaya, Mumbai-32.)

3. M/s. Monarch Erectors Pvt. Ltd., through its)
   Managing Director, having its Registered Office)
   at Shop No.1, Ground Floor, Pushpak Apartment,)
   Ulhasnagar, Dist.Thane.)

4. State of Maharashtra.)..Respondents

Mr. C.M. Korde, instructed by Mr. Nitin Jamdar for the petitioner.

Mrs. J.S. Pawar, Additional Government Pleader, forn respondent Nos. 1, 2 and 4.

Mr. Subodh Dharmadhikari instructed by Mr. V.N. Tayde for respondent No.3.

CORAM: **DALVEER BHANDARI, C.J.** &
S.A. BOBDE, J.

DATE: **JANUARY 28, 2005**.

ORAL JUDGMENT (Per Dalveer Bhandari, C.J.)

The petitioner, Bhiwandi Nizampur City Municipal Corporation, is established under the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "the Act"). Respondent No.1 was the Chief Minister of the State of Maharashtra. Respondent No.2 is the Secretary, Urban Development Department. Respondent No.3 is an agent appointed by the petitioner-Corporation under an agreement for collection of octroi. Respondent No.4 is the State of Maharashtra.

2. The petitioner-Corporation, in order to improve the efficiency in octroi collection, decided that (as permissible under Section 66A of the Act) the collection of octroi be privatised and an agent be appointed who will collect the octroi and would give an assured sum to the Corporation.

3. The petitioner-Corporation invited tenders for appointment of an agent for collection of octroi for a period of one year. The respondent No.3 made a final offer to collect the octroi on behalf of the petitioner-Corporation. The offer was accepted by the petitioner-

Corporation on certain terms and conditions by entering into contract with respondent No.3. As per the contract, respondent No.3 is to collect the octroi on behalf of the Corporation to the tune of Rs.71,74,57,285/- for the period from 22nd March, 2003 to 28th February, 2004. A condition of depositing an amount of Rs. 1,45,99,421/- with the petitioner-Corporation every week was stipulated in the agreement.

4. By an order dated 13th November, 2003, respondent No.1 increased the duration of the contract by 31 days i.e. from 29th February, 2004 to 30th March, 2004, on the same terms and conditions as in the contract and also directed respondent No.3 to pay the balance amount along with interest till the end of extended period.

5. It may be pertinent to mention that a Public Interest Litigation was filed in this Court bearing PIL No. 1 of 2004, by one Siddheshwar Mogalappa Kamurthi. On 4th February, 2004, when the PIL came up for hearing, it was pointed out to the Court that the Corporation is not proposing to challenge the order of the Chief Minister and the letter addressed by the Commissioner to the Secretary indicating the reasons

was placed on record. The PIL was disposed of by observing that it was not a fit case for exercise of the writ jurisdiction in public interest.

6. Respondent No.3 filed a suit bearing Special Civil Suit No. 83 of 2004 in the Court of Civil Judge, Senior Division, Thane, praying that an injunction be issued in favour of respondent No.3, restraining the Corporation from invoking the bank guarantee till 30th March, 2004. The Civil Judge, Senior Division, Thane, has granted an order of *status quo* on 20th February, 2004.

7. The petitioner-Corporation filed an appeal against the said order in this Court, being Appeal from Order No. 357 of 2004. In the said appeal, this Court passed an order permitting the petitioner-Corporation to encash the bank guarantee under certain conditions. This Court on 19th April, 2004, disposed of the appeal giving further directions.

8. Respondent No.3 made a representation to the Corporation that it should be permitted to levy octroi on grey cloth. On 28th August, 2003, respondent No.3 made an application to the Secretary, Urban

Development Department, that the petitioner-Corporation is preventing them from collecting octroi on grey cloth. Respondent No.3 has claimed that it has suffered a loss at the rate of Rs.5/- lakh per day since it started collecting octroi and prayed that it be given compensation for 158 days between 22nd March, 2003 and 26th August, 2003.

9. The Commissioner in his order dated 10th October, 2003, noted that as per item 61 in the Octroi Rules, upto 9th October, 2003, an amount of Rs.48,22,996/- was collected as octroi on grey cloth. Apart from this, it was further noted that a penalty of Rs.58,307/- was recovered by the Officers. The Commissioner has also stated that the Corporation had not restrained respondent No.3 from collecting octroi on grey cloth and it is within the powers of the contractor to collect octroi and, therefore, no fresh permission is required to be given.

10. On 14th October, 2003, respondent no.3 filed an appeal before the Chief Minister and claimed an amount of Rs.7,90,00,000/- as compensation.

11. The appeal filed by respondent No.3 was decided by the Chief Minister, who by his order dated 24th March, 2004, directed the petitioner-Corporation to pay an amount of Rs.7,77,99,150/- towards compensation. The said order is challenged by the petitioner-Corporation in this petition.

12. In the impugned order it is stated that respondent No.3 was appointed as octroi agent for the period from 22nd March, 2003 to 28th February, 2004, for recovery of octroi on the goods arriving within the Bhiwandi Nizampur Municipal Corporation territories. According to the agreement, as per weekly rates prescribed, a total amount of Rs.72.74 crores is to be paid to the Municipal Corporation by the octroi agent against the recovery. It is stated that from 31st March, 2003, to 30th April, 2003, due to the increase made by the Central Government in the contract tax rate for the powerlooms, there was a strike called by Powerloom Owners and Transporters, and in these circumstances, for the loss in the octroi income during this period, the agent has filed an appeal. The said octroi agent was given an extension of 30 days from the expiry of the contract period and during this extended period, the octroi agent has to make the payment of original amount of Rs.71.74

crores besides the amount as per the weekly rate mentioned in the original agreement to the Municipal Corporation, for which an order was passed.

13. In the appeal dated 14th October, 2003 and thereafter supplementary applications in the appeal dated 22nd December, 2003 and 31st December, 2003 filed by respondent No.3, respondent No.3 made the following prayers:

(1) A compensation of Rs. 9 lakh per day for the loss caused to the agent due to non-recovery of octroi on raw cloth, from the date of the contract till the date of decision in the Appeal, be paid.

(2) Permission be granted for recovery of octroi in raw cloths for the remaining period.

14. In the impugned order it is mentioned that respondent No.3 amended the prayer that as per the survey carried out by the Municipal Corporation regarding the arrival of raw cloths arriving in the territories of Corporation, the agent be paid compensation at the rate of Rs.26/-

for the total raw cloth eligible to be charged octroi of 48005 tags per day, totalling to Rs.12,48,130/- per day from 7th June, 2003 i.e. the date of their original application to the Commissioner of petitioner-Corporation. To substantiate the same, it is stated that the loss above referred was caused due to the role played by the Municipal employees/officers working with them as well as in spite of their demands that the Corporation has not given any proper guidance in this regard.

15. In the order, the Chief Minister has mentioned that with reference to the demand of respondent No.3, the Commissioner of petitioner-Corporation, stated that though there is provision for collection of octroi on raw cloth in the Maharashtra Municipal Octroi Rules, while recovering the octroi on the same, there was severe agitation from the importers because the said raw cloths were brought within the Municipal territories only for packing, transportation and for registration in the office and as such collection of octroi on the same was stopped since the period of the then Municipal Corporation. According to them, octroi is being recovered even today on the raw cloths being arrived within the Municipal Territories from Ichalkaranji, Ahmedabad, Tarapur,

Kalyan, etc. Therefore, it is not necessary to admit the demand made by respondent No.3. Similarly, respondent No.3 ought to have adopted procedures prescribed in the said Octroi Rules Form Application No.4 for octroi recovery/registration of the raw clothes which arrived within the Municipal territories, they made a mistake by not adopting the said provision and on this reason alone the prayer of respondent No. 3 cannot be admitted. In the impugned order it is mentioned that after the survey conducted by the Municipal Corporation from 11th January, 2004 to 17th January, 2004, regarding the raw cloth which arrived in the Municipal areas from the factories adjacent to Bhiwandi Nizampur, the Corporation submitted a report to the Government in which average 12776 tags for packing pressing per day, for office purpose average 23,205 tags per day and for dying average 11973 tags per day of raw cloths were mentioned which arrived in the Municipal areas. It is mentioned in the order that, according to the Corporation, the Commissioner, vide his letter dated 10th October, 2003, had informed that Municipal Corporation never objected collection of octroi on the raw cloths arrived within the Municipal areas. Therefore, it was the duty of the agent to collect the octroi as per rules.

16. On 18th October, 2003, the Commissioner of petitioner-Corporation, mainly for the reason of law and order situation, communicated his opinion not to collect octroi. That means after 18th October, 2003, there was a ban for collection of octroi by respondent No.3. As per rules, the income of respondent No.3 has decreased on the said goods. In this regard, as per the survey conducted by the Municipal Corporation, the goods arrived for packing and transportation are not liable for octroi as it is being taken away quickly. Moreover, the goods being arrived for dying purpose were liable for full octroi charges as applicable. Hence, the nature of goods are being changed.

17. In the impugned order, the Chief Minister, after taking into consideration all the facts and on the basis of condition No. 24 of the agreement and para No.23 of the tender, passed the following order, which is reproduced as under:-

> "As the agent was stopped from collecting octroi on the raw cloths being arrived in the Municipal areas, from the factories of the neighbouring villages adjacent to Bhiwandi Nizampur

Municipal Corporation, by the Commissioner, Bhiwandi Nizampur Municipal Corporation, vide his letter dated 18.10.2003 on the basis of intimation of the General Meeting of the Corporation, the agent had faced a loss of octroi income on the goods for the remaining periods.;

(2) After the survey conducted by the Municipal Corporation, regarding the raw cloths being arrived as the goods arrived for packing press, transport are being taken away quickly and as such it cannot be said that the Agent has faced any loss of octroi income on these goods. Therefore, the prayer for compensation for octroi loss on raw cloths arrived for packing press cannot be admitted.

(3) But an average 11973 tags (bales) are being arrived per day for dyeing purpose which are liable for octroi charges and as such it is admitted that the Agent had to face a loss of total Rs. 3,95,900/- of octroi income, at the rate of Rs.20/- per tag for the period 18.10.2003 to 30.03.2004 being the remaining period of the contract – total 165 days.

(4) For goods in office survey, it is found that there is a confusion regarding surveying of goods being arrived under Office survey purposes. Therefore out of the total 23205 tags per day arriving for this purpose, we take 50% of the same as liable for octroi charges and on this basis, at the rates prescribed above, for 165 days, the Agent had to face a loss of total Rs.3,82,88,250/- and same is approved.

(5) For the loss compensation mentioned in Serial Nos. 3

and 4 above, the Municipal Corporation may make the payments of Rs.7,77,99,150/- from the amount deposited with them by the Agent, or adjust the same against the outstanding amount payable by the Agent to the Corporation for which the Commissioner, Bhiwandi Nizampur Municipal Corporation may initiate steps at the earliest.

(6) After the completion of the said contract period,the Municipal Corporation is to mention clearly regarding octroi charges on disputed raw cloths while charging octroi in future, so that this situation may not arise again."

17.1 As the agent was stopped from collecting octroi on the raw cloths arrived in the Municipal areas, because of the letter of the Commissioner dated 18th October, 2003, the agent has faced a loss of octroi income on the goods for the remaining periods. In the order it is mentioned that on an average 11973 tags (bales) arrived per day for dyeing purpose which were liable for octroi charges and as such it is admitted that the agent had to face a loss of total Rs.3,95,900/- of octroi income, at the rate of Rs.20/- per tag for the period 18th October, 2003 to 30th March, 2004 being the remaining period of the contract- total 165 days. In the order it is mentioned that there is a confusion regarding

surveying of goods being arrived under office survey purposes. Therefore, out of the total 23205 tags per day arriving for this purpose, the Corporation take 50% of the same as liable for octroi charges and on this basis, at the rates prescribed above, for 165 days, respondent No.3 had to face a loss of total Rs.3,82,88,250/- and the same was approved. For the loss compensation mentioned in serial Nos. 3 and 4, the Corporation may make the payment of Rs.7,77,99,150/- from the amount deposited with them by the agent or adjust the same against the outstanding amount payable by respondent No.3 to the Corporation for which the Commissioner may initiate steps at the earliest.

18. Being aggrieved by the aforesaid order passed by the Chief Minister, the petitioner preferred this petition with a prayer that this Court be pleased to quash the order dated 24th March, 2003.

19. Pursuant to the show cause notice issued by this Court, reply affidavit has been filed by Deputy Secretary to the Government, Urban Development Department, on 25th August, 2004. It is mentioned that the Corporation, without prior permission of the State Government, adopted the practice of not collecting octroi on grey cloth manufactured in the

neighbouring villages of the Municipal Corporation. It is mentioned that the grey cloth which was brought within the jurisdiction of the Municipal Corporation, was entitled for octroi duty as per the prevailing rules at that time. It is mentioned that the Municipal Corporation did not follow the provisions of Rule while exempting these goods from collection of octroi. According to the deponent, there is no infrmity in the order passed by the Chief Minister and the same does not call for any interference from this Court.

20. Respondent No.3 has also filed a comprehensive affidavit on 22nd July, 2004. It is mentioned in the reply that the conduct of the Corporation in filing the petition as framed and filed is to say the least not honest. Respondent No.3 preferred an appeal before the State Government in terms of clause 23 of the terms and conditions of contract and the Corporation submitted its response to the appeal by a communicated dated 3rd February, 2004, rooted through the Secretary, Urban Development Department, Mantralaya, Mumbai. In response, the petitioner further candidly admitted that the grey cloth being imported within the octroi limits was liable for levy of octroi and that the claim of respondent No.3 could be considered only with respect to octroi on grey

cloth imported within the octroi limits for dying as, according to it, the import of grey cloth under other heads was not for use, consumption or sell within the octroi limits. It is further mentioned that though the petitioner-Corporation admitted that payable octroi could not be collected on grey cloth because of opposition to it and it was also not possible to accept deposit and insist upon form 4, even from the time when Municipal Council was in existence. In the reply, affidavit dated 3rd February, 2004, filed by the petitioner-Corporation to the appeal preferred by respondent No.3 has been filed. In this affidavit, the Corporation conceded before the first respondent with regard to the entitlement of respondent No.3 to collect octroi on grey cloth being imported within the octroi limits for dying and also to its entitlement to receive compensation occasioned because of the prohibition imposed by the petitioner-Corporation. The petitioner-Corporation was estopped and disentitled to challenge the award made by the first respondent at least to the extent it pertains to loss of octroi duty on grey cloth imported from adjoining areas for the purpose of dying. The petitioner-Corporation has suppressed the communication dated 3rd February, 2004 deliberately. The relevant portion of the communication dated 3rd February, 2004 reads as under:

> "But as stated issue No.7 Commissioner has informed vide his letter that the Municipal Corporation had never restrained to make recovery of octroi previously on the grey cloth. The Commissioner vide letter dated 18.10.2003 prohibited the agent for collection of octroi on grey cloth due to the decision of the general board with reference to issue no.9. Hence the amount of octroi on grey cloth which is imported for dyeing purpose can only be considered. As stated in the report of grey cloth which has been enclosed, during the seven days 83811 grey cloth bundles have been imported for dyeing and processing. Thus total number of takas received per day for dyeing comes to 11973 and as per existing rate, octroi of Rs.20/- per Taka is being charged. It can be said that Contractor could have recovered the octroi which would have been calculated accordingly."

21. In the reply it is stated that respondent No.3 was prohibited from collecting octroi on grey cloth imported from adjoining areas from 18th October, 2003. In view of the above, respondent No.3 stated that the award of the first respondent is just, legal and proper and suffers from no vice calling for an interference by this Court in its extraordinary jurisdiction under Article 226 of the Constitution of India. Respondent

No.3, in the reply, denied that as per the contract, respondent No.3 was to collect octroi on behalf of the Corporation to the tune of Rs.71,74,57,285/- for the period from 22-3-2003 to 28-2-2004 as alleged. What in fact the contract provided for was that respondent No.3 would collect octroi as per the Act and the Octroi Rules during the said period from 22-3-2003 to 28-2-2004 in consideration of the third respondent paying an amount of Rs.71,74,57,285/- regardless of the quantum of collection by respondent No.3 during that period. If the collection fell short of the said amount of consideration, respondent No.3 was required to bear the loss while if it exceeded the said amount of consideration, those were to the earnings of respondent No.3. According to respondent No.3, the said contract was a commercial transaction and that the weekly payment was a term for convenience of payment, but the total of all the weekly payments was not to exceed the agreed amount of Rs. 71,74,57,285/-.

22. Respondent No.3 further mentioned in the reply that even in the contract awarded, the third respondent had been permitted to collect octroi on all goods chargeable to octroi upon its import. According to respondent No.3, Bhiwandi Nizampur is known as a

Textile City and import of yarn and grey cloth constitute bulk of the goods imported. The population of Bhiwandi Nizampur does not exceed 15 lacs and the third respondent would never have agreed to pay an amount as large as Rs.71,74,57,285/- for a period of 11 months and 10 days, had it known that it would not be permitted to collect octroi on grey cloth imported from adjoining areas which constitute substantial part of the import of goods. The third respondent further stated that even in bigger cities, Corporations have not been successful in obtaining as high an amount of consideration as Rs.71,74,57,285/- for award of octroi collection agency. Thus, according to respondent No.3, the petitioner-Corporation has suppressed all these facts deliberately.

23. In the said reply, a reference has been made to the order dated 11th February, 2004 passed by this Court in PIL No. 1 of 2004. This Court in para 8 of the said order observed thus:

> "8. In the instant case, when for one month, the contractor could not collect the amount of octroi duty, virtually what was done was not an extension, but to

> grant twelve months contract that was entered between the parties. In our opinion, therefore, the order does not deserve interference and the petition is deserved to be dismissed. It is accordingly dismissed."

It is also denied that the order dated 4th February, 2004 passed by another Division Bench of this Court in Writ Petition No. 28 of 2004, did not stop the Corporation from contending that clause 23 of the terms and conditions did not constitute an arbitration agreement.

23. In view of the affidavit in reply of third respondent, it is absolutely clear that respondent No.3 was prevented from collecting octroi because of the letter issued by the Commissioner of the Corporation dated 18th October, 2003. The compensation which has been arrived at by the first respondent was primarily on the basis of the ban imposed by the Corporation vide letter dated 18th October, 2003. Respondent No.3 cannot be faulted for not collecting octroi because there was a specific ban imposed on collection of octroi on the raw cloths arrived in the municipal areas.

24. On careful scrutiny of the impugned order, we do not find any perversity in the impugned order passed by respondent No.1, which

calls for our interference in its extraordinary jurisdiction under Article 226 of the Constitution of India. This petition being devoid of any merit is accordingly dismissed.

CHIEF JUSTICE

S.A. BOBDE, J.